In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1629

DAVID E. BLUETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1-8) is not reported; the order denying a petition for rehearing and other relief (Pet. App. 9-11) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20) was entered on March 15, 1973; an order denying a petition for rehearing and other relief was issued on April 4, 1973. By order of May 10, 1973, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including June 4, 1973, and the petition was filed on that date.

QUESTIONS PRESENTED

1. Whether a postal money order is an "obligation or other security of the United States" for purposes of 18 U.S.C. 472-473.

2. Whether the jury was properly instructed on the issue of intent.

3. Whether evidence was seized in violation of the Fourth Amendment.

4. Whether the trial court properly denied the motion to sever offenses.

5. Whether venue lay in the District of Maryland, where petitioner was tried.

6. Whether the jury's verdict must be set aside as inconsistent.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of importation, possession, concealment, transfer, receipt, and conversion of forged money orders, and of aiding and abetting, in violation of 18 U.S.C. 472, 473, 641, and 2[1] (App. 5-12, 45).[2] He was committed to the custody of the Attorney General for study and report pursuant to 18 U.S.C. 4208(b). Sentence was thereafter suspended and petitioner was placed on probation for a period

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[1] Petitioner was acquitted on one count charging that he obtained the entry of the money orders by false statements on a customs form and on three counts charging the importation, concealment, and introduction into commerce of marijuana.

[2] "App." denotes the Appendix on appeal; "Tr." denotes the reporter's transcript of petitioner's trial in the district court, excerpts of which appear at App. 99-206.

of three years (App. 46-46A). The court of appeals affirmed (Pet. App. 1-8).

While in Vietnam, petitioner mailed two parcels from Saigon to a Mr. and Mrs. Deily in Maryland. The first of these (the "money order" parcel) was opened on October 2, 1970, by a customs examiner at Oakland, California, in the course of his usual duties. The examiner discovered 188 United States postal money orders, which had been stolen in blank from the Buellton, California post office in 1969. The money orders when found each bore a forged money order machine imprint, punch, and validation stamp in the amount of $100, a forged issuing officer's stamp,[3] and the forged initials of an issuing clerk (App. 25-27). Following delivery to United States postal inspectors in Baltimore, Maryland, who reopened the package to verify the statements of the customs officials, the money order parcel was delivered on October 14, 1970, to the addressees. A search warrant was obtained on that date for the parcel (App. 50-52), which was then seized.

The second parcel (the "marihuana" parcel), also addressed to the Deilys, was inspected by postal inspectors in Baltimore, Maryland, on October 19, 1970, and was found to contain approximately two and a half pounds of marihuana packed in two cracker cans (App. 27). This package was also delivered to the addressees and then seized pursuant to a search warrant (App. 53-55).

At trial, petitioner testified that he had mailed a number of parcels to Mr. and Mrs. Deily, including the two here at issue, from Saigon, South Vietnam, in the latter part of August 1970, while he was preparing

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[3] "Army and Air Force Postal Service, APO San Francisco, California 96309."

to move from Saigon to the United States. He stated that these parcels were packed either by himself, a Miss Hoa, or professional packers (Tr. 225-231).

Mrs. Deily testified that she and her husband had agreed to accept petitioner's parcels from Vietnam and hold them for petitioner to pick up on his return. In fact, petitioner did stop by their home to pick up several of his packages (Tr. 89-91).

ARGUMENT

1. Petitioner's contention, first raised on appeal, that United States postal money orders are outside the definition of "obligation or other security of the United States" within the intendment of 18 U.S.C. 472 and 473, is erroneous. The plain language of those sections and of 18 U.S.C. 8 (which defines the term "obligation or other security of the United States") clearly covers postal money orders. Although the Ninth Circuit concluded in *Kniess* v. *United States*, 413 F. 2d 752, that a prosecution for passing forged postal money orders would not lie under 18 U.S.C. 472, but only under 18 U.S.C. 500, that case involved conduct which was clearly within 18 U.S.C. 500, and the court concluded that the lesser penalties provided therein should therefore control, despite the literal applicability of 18 U.S.C. 472.[4] Here, as the court below correctly noted, the offenses charged lie only under 18 U.S.C. 472 and 473 (Pet. App. 9-11). There is no indication in the legislative history of either the counterfeiting or the money order provisions that Congress intended that 18 U.S.C. 500 should be the exclusive penalty applicable to all

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[4] Petitioner's sentence here, unlike that of the defendant in *Kniess*, was less than the maximum provided in 18 U.S.C. 500.

illicit transactions involving postal money orders.[5] Therefore, regardless of the correctness of the conclusion in *Kniess* when the conduct involved is prohibited by both statutes, it is clear that 18 U.S.C. 500 does not bar the applicability of 18 U.S.C. 472 and 473 to conduct which is not within its narrower scope.[6]

2. Petitioner's complaint regarding the jury instructions is without merit. The jury was instructed that the elements of each offense of which petitioner was subsequently convicted required the government to prove that petitioner acted with the specified illicit intent, including the intent to defraud (Tr. 642, 645, 649; App. 164, 167, 171). It was further instructed that "[t]o act with intent to defraud means to act wilfully and with the specific intent to deceive or cheat * * *" (Tr. 652; App. 174) and that "[a]n act or a failure to act is wilfully done if done voluntarily and intentionally and with the specific intent to do something the law forbids, or to fail to do something the law requires to be done, that is to say, with a bad purpose either to disobey or disregard the law" (*ibid.*).

These instructions clearly explained to the jury that petitioner could not be convicted if the jury believed

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[5] Indeed, Congress has specifically recognized the applicability of 18 U.S.C. 641, dealing with stolen public property, to money order offenses. S. Rep. No. 92-1074, 92d Cong., 2d Sess. Petitioner was convicted on count five of the indictment of violations of 18 U.S.C. 641; petitioner's argument based on *Kniess* does not affect that conviction.

[6] Cf. *United States* v. *Jacek*, 196 F. Supp. 152 (W.D. Pa.), affirmed, 298 F. 2d 429 (C.A. 3), certiorari denied, 370 U.S. 952, in which the defendant was sentenced under 18 U.S.C. 473 for receipt of forged postal money orders with intent to defraud, and under 18 U.S.C. 500 for forgery of postal money orders.

his defense that he was ignorant of the contents of the money order package. Contrary to petitioner's contentions (Pet. 15), they did not permit conviction on a finding that petitioner was "negligent or careless in failing to check the package before the mailing."

3. Petitioner claims that the opening and inspection of the money order parcel in California constituted an unreasonable search and seizure in violation of his Fourth Amendment rights. But the right of customs officials to search persons and things coming into this country without a search warrant or probable cause has long been recognized. Such border searches are not unreasonable and are thus "not embraced within the prohibition of the [Fourth] Amendment." *Boyd* v. *United States,* 116 U.S. 616, 623; see also *Carroll* v. *United States,* 267 U.S. 132, 153. More recently, this Court held in *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 376:

> * * * [A] port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country. * * *

The same right to exclude illegal articles justifies warrantless searches of packages sent into the country through the mails. *United States* v. *Beckley,* 335 F. 2d 86 (C.A. 6), certiorari denied *sub nom. Stone* v. *United States,* 380 U.S. 922; *United States* v. *Galvez,* 465 F. 2d 681, 687 (C.A. 10).

4. The district court's refusal to sever the money order counts from the marihuana counts was proper. The record is clear that petitioner mailed the two parcels at approximately the same time as parts of a common scheme—namely, to bring contraband into the country in his personal belongings in the course of his return from Saigon. Rule 8(a), Fed. R. Crim. P., provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged * * * are of the same or similar character or are based on the same act or transaction or on *two or more acts or transactions connected together or constituting parts of a common scheme or plan.* [Emphasis supplied.]

Had the money orders and the marihuana been packed in the same carton, there could be no doubt that the offenses charged arose from the same transaction; the fact that they were mailed in separate packages, but from the same place, to the same place, and at nearly the same time, does not justify a different result. In addition, the defense of which petitioner claims he was deprived was that the money orders were mistakenly packed in his belongings by Miss Hoa. Thus, it was relevant to show that petitioner, while moving his belongings to this country, was putting various contraband items into his parcels as part of a general plan.

5. Petitioner's contention that venue did not lie in the District of Maryland is not properly before this Court, since the question of venue was never raised in the district court. Under such circumstances, petitioner is deemed to have waived objection to venue. *United States* v. *Dryden*, 423 F. 2d 1175 (C.A. 5), certiorari denied, 398 U.S. 950; *Gilbert* v. *United States*, 359

F. 2d 285 (C.A. 9), certiorari denied, 385 U.S. 882; *United States* v. *Gross*, 276 F. 2d 816 (C.A. 2), certiorari denied, 363 U.S. 831; *United States* v. *Jones*, 174 F. 2d 746 (C.A. 7).

In any event, venue was properly laid in Maryland, since the evidence was sufficient to prove petitioner had constructive possession of the money orders in Maryland. Mrs. Deily testified that the parcel containing the money orders was delivered to her home on the understanding that she would hold it for petitioner to pick up; indeed he had picked up other such packages (Tr. 88-90). Petitioner thus met the test for constructive possession by "knowingly having both the power and intention at a given time to exercise dominion or control over the property." *United States* v. *Cousins*, 427 F. 2d 382, 384 (C.A. 9).

6. Finally, petitioner's contention that the jury's verdict is inconsistent because he was acquitted on count four but convicted on the other counts involving the money orders is not well founded. "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment [citations omitted]." *Dunn* v. *United States*, 284 U.S. 390, 393.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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